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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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KEWAZINGA CORP.,

Plaintiff,

New York, N.Y.

v.

20 CV 1106 (LGS)

GOOGLE, LLC,

Defendant.

## Teleconference

June 25, 2020  
10:30 a.m.

Before:

HON. LORNA G. SCHOFIELD,

District Judge

## APPEARANCES

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1                   THE COURT: Good morning, counsel.

2                   THE DEPUTY CLERK: We are here in the matter of 20 CV  
3 1106, Kewazinga Corp. v. Google, LLC. The parties' names have  
4 been noted for the record.

5                   Before we begin, I would like to remind the parties  
6 that recording or broadcasting of this proceeding is prohibited  
7 by policy of the Judicial Conference of the United States.  
8 Violation of these prohibitions may result in sanctions.

9                   Second, we have a court reporter present today. In  
10 order to maintain an accurate record, I am going to ask each  
11 counsel to state their name each time they speak before they  
12 speak, just to make sure we have a clear record.

13                   We are here before the Honorable Lorna G. Schofield.

14                   THE COURT: Good morning again, everyone. Thank you  
15 for being here and attending this conference remotely.

16                   We're here for a followup conference, following your  
17 limited discovery on the issue of equitable estoppel, and the  
18 question is whether, with respect to that issue, it can be  
19 resolved on the papers or whether there is an issue of fact  
20 that would require a hearing so that the factual issue can be  
21 resolved.

22                   Let me ask first whether you have different views on  
23 that subject or whether you even know.

24                   MR. DESMARAIS: This is John Desmarais for Google, the  
25 defendant whose equitable estoppel defense is at issue. I

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1 think we have a shared view. Your Honor had given us -- but it  
2 comes from a different perspective so maybe it would help if I  
3 took a minute and explained.

4 Your Honor give gave us two months for discovery and  
5 we achieved that. Both sides asked for documents and exchanged  
6 documents, both sides asked interrogatories and answered  
7 interrogatories, and asked requests to admit and answered  
8 those, and then we took depositions both 30(b)(1) and 30(b)(6).  
9 So discovery on the issue is concluded, and we met and  
10 conferred with each other as to what to recommend today. And  
11 we are both recommending that we proceed by summary judgment,  
12 but in some sense, you know, it is interesting because we take  
13 it from different sides.

14 So Google believes that the limited discovery has  
15 shown that the defense is very strong and the case should be  
16 dismissed. Kewazinga believes the evidence has shown that the  
17 defense will fail.

18 So, what we agreed to is, with your Honor's  
19 indulgence, is we would move for summary judgment. Kewazinga  
20 would respond and cross move for summary judgment, and then  
21 we'd have a hearing on summary judgment. That being said --

22 THE COURT: Okay.

23 MR. DESMARAIS: -- both sides think it can be resolved  
24 in summary judgment. Because we are on different sides, that  
25 may mean there is a fact issue. So, what we further agreed,

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1 assuming your Honor is amenable, is we'd have the briefing,  
2 we'd have the summary judgment hearing, and if your Honor felt  
3 that it couldn't be decided after hearing the arguments, that  
4 there might still need to be an evidentiary hearing on whatever  
5 issue your Honor believes can't be resolved. But the parties  
6 believe it can be done on the papers.

7 THE COURT: That's very helpful. Thank you for  
8 conferring with each other.

9 Mr. Gilman, would you like to add anything?

10 MR. GILMAN: No, I think Mr. Desmarais summarized it  
11 accurately. I mean, I am happy to talk through how we view the  
12 defense and why we think this is amenable to summary judgment.  
13 But we think that's a discovery issue, and there is no factual  
14 issue here and that the defense should fail.

15 THE COURT: I don't think there is any need to talk  
16 about the merits of the arguments at this point. I have some  
17 sense of your views on the law from the prior letters. I'm  
18 sure you now have facts, supposedly undisputed, I hope that's  
19 true.

20 And so, have you discussed and agreed on a briefing  
21 schedule?

22 MR. DESMARAIS: Yes, your Honor. If I might -- this  
23 is John Desmarais. If I might, maybe Mr. Gilman can correct me  
24 if I'm wrong.

25 What we would propose to your Honor is Google files

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1 its opening summary judgment brief on July 15, Kewazinga  
2 responds to that on July 29, and if it chooses, it will cross  
3 move at that time for summary judgment for them. On August 12,  
4 Google will reply to our motion and respond to Kewazinga's,  
5 should they file one, and then on August 26, Kewazinga will  
6 reply to their motion.

7 We've also agreed, assuming your Honor is amenable,  
8 that we would continue the stay of general discovery until the  
9 Court rules on equitable estoppel, with the exception that we  
10 made at the last conference which is we'll continue with your  
11 Honor's claim construction schedule and validity contention  
12 schedule. But otherwise, general discovery will hold until  
13 your Honor decides the equitable estoppel issue, whether that's  
14 at a summary judgment hearing or if you have a subsequent  
15 evidentiary hearing because there is a disputed fact that you  
16 find. Discovery will be stayed until this issue is resolved.  
17 And then after it's resolved, if the case is not dismissed, one  
18 week after your decision, the parties can serve general  
19 discovery. If that's okay with the Court.

20 THE COURT: Okay. Let me ask Mr. Gilman a question.  
21 Have you decided to cross move?

22 MR. GILMAN: Yes, your Honor. We will cross move.

23 THE COURT: So I'll just assume that for purposes of  
24 the briefing schedule. Then, the other question is, some cross  
25 motions are more in the nature of a mirror image of the initial

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1 motion, and therefore, they don't necessarily raise more  
2 issues, they just make the opposite argument. But some cross  
3 motions raise entirely different issues or somewhat different  
4 issues, and I'm wondering what you anticipate, Mr. Gilman.

5 MR. GILMAN: So, your Honor, this is Tim Gilman from  
6 Stroock on behalf of Kewazinga. After fact discovery closed,  
7 last week, we sent over an eight-page letter to Google  
8 outlining what we believe are the bases why their defense fails  
9 as a matter of law, based on all the facts that we've adduced.  
10 So we've laid out our theory there. So to some extent, Google  
11 might know better, because we haven't seen their theory, they  
12 might know whether it is the identical issue or not. I do  
13 think there is obviously a lot of factual overlap between what  
14 the two parties will be discussing. But, it's hard to say in a  
15 vacuum how different -- if there will be any legal disputes  
16 between the parties. I know before there was an issue about  
17 whether the '234 patent, whether their defense fails as a  
18 matter of law based on some of the controlling federal circuit  
19 precedents. But I think the core facts about the interactions  
20 between the parties in 2006, in 2013, in 2018, I think are  
21 not -- I don't think there are factual disputes about what  
22 happened and what documents were exchanged during those times.

23 THE COURT: Let me hear from the defendant. What I'm  
24 trying to figure out is what a reasonable allotment of page  
25 numbers is. I usually have a pretty strict limit on page

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1 numbers. I usually increase that somewhat when there are cross  
2 motions, but the extent of the increase depends on how much new  
3 material there is as between the two motions.

4 Mr. Desmarais, since you have the letter, do you want  
5 to respond to that?

6 MR. DESMARAIS: Yes, your Honor. I think your Honor  
7 brings up a good point. There is no substantive difference  
8 between our motion and the cross motion. So equitable estoppel  
9 has three elements, as your Honor knows: Misleading conduct,  
10 reliance, and material prejudice. We believe the evidence we  
11 just took satisfies those three elements. In fact, we think it  
12 is one of the strongest cases that's been decided. Kewazinga's  
13 eight-page letter says the evidence doesn't show misleading  
14 conduct, doesn't show reliance, doesn't show material  
15 prejudice. So I don't think there is any dispute on the  
16 evidence. We have a different view of what it shows. So, I  
17 think their cross motion is the opposite of our motion.

18 THE COURT: Yes?

19 MR. GILMAN: This is Timothy Gilman from Kewazinga  
20 again. There is one caveat, I think there is one issue that we  
21 will raise that I don't believe Google will raise which is the  
22 issue of whether any unclean hands by Google bars their  
23 equitable defense.

24 I think there are two aspects of this. We think that  
25 the discovery shows that they copied our technology in 2006,

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1 and that whether willful infringement is a bar to their now  
2 invoking equitable estoppel, and there are also interactions in  
3 2018 when we now know they were anticipating this second  
4 litigation being filed in 2018, and they took efforts to try to  
5 disqualify Stroock from being Kewazinga's counsel in this  
6 anticipated litigation, and we believe both of those facts  
7 demonstrate unclean hands that would bar Google's claim as  
8 well. Which I assume they would not raise in their affirmative  
9 motion.

10 THE COURT: So, in that case --

11 MR. DESMARAIS: May I --

12 THE COURT: I don't want to hear anything more about  
13 the merits. What I want to do is tell you what the page limits  
14 are. I'll put all of this in a written order, both the  
15 schedule and the page limits, and I will recommend an  
16 allocation of pages but you can change the allocation as long  
17 as you stay within the page limit, which is 40 pages.

18 So you each get two briefs, and often what happens is  
19 that the defendant, who is the initial movant here, would split  
20 their pages and then the cross movant, who is the plaintiff  
21 here, would put most of their pages in the first brief, and  
22 save some smaller number for what is just the reply brief at  
23 the end. But the limit over all is 40 pages per side. And  
24 that's a little bit more than if this were just one simple  
25 motion. So, if you don't need all those pages, but all means

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1 don't use them.

2 I have other rules that relate to the number of  
3 exhibits and page limits, courtesy copies. Please look both at  
4 the individual rules and the emergency rules. The major  
5 difference that I'm thinking of between the two is I don't want  
6 paper courtesy copies because with everyone working remotely,  
7 it is just too cumbersome. So I'm happy to just rely on the  
8 papers that are filed on the docket, assuming they are all on  
9 the docket. So, I'll issue an order.

10 Is there anything else we need to deal with today?  
11 Let me just address the discovery issue. I'm happy to accept  
12 your proposal on discovery, which continues the same general  
13 discovery, but continue with discovery and schedule that  
14 relates to plaintiff's motion. So, I will put that in the  
15 order as well.

16 Now is there anything we need to discuss?

17 MR. DESMARAIS: Nothing from Google, your Honor.

18 MR. GILMAN: On behalf of Kewazinga, just to be  
19 clear --

20 THE COURT: This is Mr. Gilman?

21 MR. GILMAN: This is Mr. Gilman, sorry, your Honor.  
22 The parties agree if there is any ambiguity, that is all of the  
23 patent rule disclosures from build up to the Markman proceeding  
24 are going to proceed on schedule, with the hopes that this case  
25 will get back on track on the schedule the parties originally

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1 discussed.

2 THE COURT: Yes. I had understood that. Thank you  
3 for that clarification. So we are adjourned. Thank you.

4 (Adjourned)

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